A

BPI INTERNATIONAL FINANCE LTD

v.

TENGKU ABDULLAH IBNI SULTAN ABU BAKAR

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COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
ZAINUN ALI JCA
SULAIMAN DAUD JCA
[CIVIL APPEAL NO: W-02-756-2007]

C

20 MAY 2009

CIVIL PROCEDURE: *Pleadings - Indemnity - Failure to plead facts - Whether claim sustainable*

D

CIVIL PROCEDURE: *Action - Striking out - Nature of claim - Whether on indemnity - Whether on breach of contract and/or duty of care - Whether claim time-barred - Rules of the High Court 1980, O. 18 r. 19 - Limitation Act 1953, s. 6*

E

CIVIL PROCEDURE: *Striking out - Application - Right to file - Whether lost with filing of unconditional appearance and statement of defence - Rules of the High Court 1980, O. 18 r. 19*

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The respondent commenced this action against the appellant to be indemnified for the sum he was held liable to pay relevant parties under two suits decided by the High Court (see [1995] 3 CLJ 77). The respondent claimed that his liabilities under the suits were attributed to the appellant's breach of contract and/or duty of care owed to him under a Memorandum of Understanding ('MOU'). The appellant denied the allegations and applied to strike

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out the respondent's writ and statement of claim under O. 18 r. 19 of the Rules of the High Court 1980 ('RHC') based on limitation. The senior assistant registrar ('SAR') allowed the application. On appeal by the respondent, the learned judge reversed the decision of the SAR on the basis that limitation had

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not set in as the respondent was claiming for indemnity as opposed to a breach of contract and/or duty of care. The appellant now appealed.

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Held (allowing the appeal)
Per Sulaiman Daud JCA:

(1) The respondent did not plead an express or implied contract of indemnity. He failed to plead with clarity the basis of his entitlement to such an indemnity. It was not sufficient for him to merely include a prayer for an indemnity without first stating the facts upon which the claim was founded. His claim could not sustain a cause of action for an indemnity. It was merely founded on a breach of contract and/or duty of care. (paras 28 & 29)

(2) It was the respondent's pleaded case that he had suffered damages in consequence of the appellant's breach of contract and/or duty of care. The question was when did the damage happen. Having found that the respondent's claim was framed as a breach of contract and/or duty of care, the causes of action would date from that breach. The facts showed that the breach must have taken place before 1983. The present action was only filed on 20 August 2003 and so was barred by s. 6 of the Limitation Act 1953. The learned judge erred in the computation of the limitation period when he failed to appreciate that the respondent's pleaded case was founded on breach of contract and/or tort and not on indemnity. (para 33)

(3) With the filing of its unconditional appearance, the appellant did not abandon its right to file the application under O. 18 r. 19 RHC. The said rule clearly provided that a striking out order might be made at any stage of the proceedings. It must necessarily follow that the entry of an unconditional appearance and the serving of the statement of defence did not preclude the appellant from making an application under the said rule. (para 34)

Bahasa Malaysia *Translation Of Headnotes*

Responden mulakan tindakan ini terhadap perayu untuk indemniti bagi jumlah wang beliau didapati bertanggungan membayar pihak-pihak berkenaan di bawah dua guaman Mahkamah Tinggi (lihat [1995] 3 CLJ 77). Responden mendakwa bahawa liabilitinya di bawah guaman-guaman tersebut adalah akibat perayu memungkiri kontrak dan/atau kewajipan berjaga-jaga kepadanya dalam perlaksanaan satu memorandum persefahaman ('MOU'). Perayu

A menafikan dakwaan tersebut dan seterusnya memohon membatalkan writ dan penyataan tuntutan di bawah A. 18 k. 19 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') atas alasan luar had masa. Penolong Pendaftar Kanan ('SAR') membenarkan permohonan tersebut. Apabila dirayui responden, yang arif hakim mengakaskan
B keputusan SAR di bawah alasan bahawa had masa tidak terpakai kerana responden membuat tuntutan indemniti dan bukan tuntutan kemungkiran kontrak dan/atau kewajipan berjaga-jaga. Perayu kini merayu.

C **Diputuskan (membenarkan rayuan)**
Oleh Sulaiman Daud HMR:

(1) Responden tidak memplidkan satu kontrak ternyata atau tersirat bagi indemniti. Dia gagal memplidkan dengan jelasnya alasan bagi haknya untuk indemniti tersebut. Ianya tidak
D mencukupi untuk hanya memohon indemniti tanpa terlebih dahulu memberikan fakta di atas mana tuntutan tersebut dibuat. Tuntutannya tidak menanggung kausa tindakan bagi indemniti. Tuntutannya hanya berasaskan kemungkiran kontrak
E dan/atau kewajipan berjaga-jaga.

(2) Kes responden ialah dia mengalami ganti rugi akibat kemungkiran kontrak perayu dan/atau kewajipan berjaga-jaga. Persoalannya ialah bila kemungkiran tersebut berlaku. Setelah mendapati tuntutan responden dirangkakan sebagai kemungkiran
F kontrak dan/atau kewajipan berjaga-jaga, maka kausa tindakan bermula dari tarikh kemungkiran tersebut. Fakta kes menunjukkan bahawa kemungkiran tersebut berlaku sekurang-kurangnya sebelum 1983. Tindakan semasa hanya difailkan pada 20 Ogos 2003 dan dengan itu dihalang oleh had masa
G mengikut s. 6 Akta Had Masa 1953. Yang arif hakim terkhilaf dalam komputasi tempoh had masa apabila beliau gagal mempertimbangkan bahawa kes responden yang diplidkan berasaskan kemungkiran kontrak dan/atau tort dan bukan indemniti.

H **(3)** Dengan memfailkan kehadiran yang tidak bersyarat, perayu tidak membuang haknya untuk memfail permohonan di bawah A. 18 k. 19 KMT. Aturan tersebut dengan jelasnya memperuntukkan bahawa perintah pembatalan boleh dibuat
I pada mana-mana tahap prosiding. Ianya mesti mengikut bahawa kemasukan tidak bersyarat atau penyampaian penyataan pembelaan tidak menghindar perayu daripada membuat permohonan di bawah aturan tersebut.

Case(s) referred to:

Chan Min Swee v. Malawangi Sdn Bhd [2000] 7 CLJ 1 HC ***(refd)***
Doree Industries (M) Sdn Bhd & Ors v. Sri Ram & Company & Ors [2001] 4 CLJ 446 HC ***(refd)***
Fu Yen Development Sdn Bhd v. Shelley Yap Leong & Co [2001] 3 CLJ 946 HC ***(refd)***
JH Rayner (Mincing Lane) Ltd v. Department of Trade And Industry And Others And Related Appeals [1990] 2 AC 418 ***(refd)***
Koh Siak Poo v. Sayang Plantation Berhad [2002] 1 CLJ 501 CA ***(refd)***
Malayan Banking Bhd v. Basarudin Ahmad Khan [2007] 1 CLJ 309 FC ***(refd)***
N Carrupaiya v. MBf Property Services Sdn Bhd & Anor [2000] 4 CLJ 116 HC ***(refd)***
Nasri v. Mesah [1971] 1 MLJ 32 ***(refd)***
Ong Ah Bee v. Hii Chung Siong, Robin [1993] 1 CLJ 504 HC ***(refd)***
R&H Green & Silley Weir Ltd v. British Railways Board (Kavanaugh, third party) [1985] 1 All ER 237 ***(refd)***
State Government of Perak v. Muniandy [1986] 1 MLJ 490 ***(refd)***
Telfair Shipping Corp v. Inersea Carriers SA; The Caroline P [1984] 1 WLR 533 ***(refd)***

Legislation referred to:

Limitation Act 1953, s. 6
Rules of the High Court 1980, O. 18 r. 19(1)(b), (c)

Other source(s) referred to:

Halsbury's Laws of Malaysia, vol 16, paras 270.190, 270.191

For the appellant - Tommy Thomas (Elaine Yap & Tan Kai Sin with him); M/s Wong & Partners
For the respondent - Jaqdip Singh; M/s Ringo Low & Assoc

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S5-22-425-2003]

Reported by Usha Thiagarajah

JUDGMENT

Sulaiman Daud JCA:

[1] The respondent (plaintiff in the court below) is a well known and respected figure from the royal family of the State of Pahang. The appellant (defendant in the court below) is a company registered in Hong Kong and is and was at all material times a wholly owned subsidiary of the bank of the Phillipine Islands.

[2] On 20 August 2003 the respondent issued the present writ against the appellant claiming, *inter alia*, for an order that the appellant fully indemnifies the respondent for such sum which the respondent is liable to pay to the members and/or Raintree Development Berhad under the Kuala Lumpur High Court Suit No. C22-204-1986 ([1995] 3 CLJ 77), and/or any other loss directly or indirectly related to it.

[3] By summons in chambers dated 15 November 2005, the appellant applied to strike out the said writ and statement of claim pursuant to O. 18 r. 19(1)(b) or (c) of the Rules of the High Court 1980 ("RHC") on the ground that the statement of claim had set up causes of action which were barred by the Limitation Act 1953 ("the Act").

[4] The striking out application was allowed by the senior assistant registrar (SAR). On appeal to the judge in chambers, the learned judge allowed the appeal and reversed the decision of the SAR. Hence the appellant's appeal to this court.

[5] After hearing submissions of counsel for both parties, we allowed the appeal with costs. We now give our reasons.

Background Facts

[6] The facts as set out in the statement of claim can be briefly stated as follows. In 1979 the respondent entered into a memorandum of understanding ("M.O.U.") with the appellant for the development and operation of a proprietary club in Malaysia ("the Club").

[7] Pursuant to the terms of the M.O.U., a company called Raintree Development Sdn. Bhd. ("RDB") was acquired in 1979. In May 1980 another company called Allied Capital Sdn. Bhd. ("Allied") was incorporated. Both RDB and Allied have common shareholders and directors which include the respondent.

[8] RDB owned the land on which the club premises were to be built. On 31 January 1981 Allied purchased the entire paid up shares of RDB, and on 9 May 1981 RDB appointed Allied as the contractor to build the club's premises.

[9] Before that on 4 May 1981, the Board of Directors of RDB passed a resolution to alter its share structure by proposing to issue 1540 Class A shares and 660 Class B shares, both for RM10,000,000 each to be sold to the public.

[10] On 21 October 1981 the respondent was elected as the President of the Protem Committee of the Club. At its meeting on 3 June 1982, the committee resolved that the entire issued and paid up capital of RDB was to be purchased by the Club from Allied for the sum of RM47 million ("the share sale"). Thereafter on 24 August 1982 a share acquisition agreement was concluded between the Club and Allied.

[11] Subsequently the members of the Club, by way of Kuala Lumpur High Court Suit No. C22-204-1986, commenced a representative action against the respondent and office bearers of the Club for damages for breach of fiduciary duties and the duty of care under the M.O.U. in connection with the share acquisition agreement. The High Court allowed the claim and ordered damages to be assessed. The members also succeeded in their counterclaim against Allied *vide* Suit No. C.23-1084-1986 for the sum of RM16,571,734, being over payment in the share sale together with interest of RM556.752 (both the suits collectively referred to as "the said suits").

[12] The respondent then commenced the present action against the appellant alleging that it had breached its undertaking and representation under the M.O.U. or alternatively its duty of care pursuant thereto.

[13] The appellant in its defence denied the alleged breach of contract or that it owed any duty of care to the respondent in the execution and performance of the M.O.U. Further the appellant pleaded that the claims herein were statue barred under the Act.

Decision Of The High Court

[14] The learned judge in allowing the respondent's appeal found that limitation had not set in as he was of the view that "the plaintiff is claiming indemnity against the defendant in respect of two suits". The learned judge relied on *R&H Green & Silley Weir Ltd v. British Railways Board (Kavanaugh, third party)* [1985] 1 All ER 237, where it was held that "in the absence of a contractual

A term to the contrary, time runs against a person seeking to enforce an indemnity from the date when he is called upon to pay, not from the date of the event giving rise to his liability to do so".

[15] The only issue that was considered by the learned High
B Court Judge which was pursued in this appeal is that of limitation. In our view, for the determination of the said issue it will be necessary to firstly determine the nature of the respondent's claim herein, ie, whether the claim is founded on breach of contract and negligence, or on an indemnity. Having determined the nature of
C the claim, the next question to be answered is at what point of time does time begin to run for the purpose of limitation under the Act.

Nature Of Claim, Whether On Contract, etc. Or On Indemnity

D **[16]** On behalf of the appellant, Mr Tommy Thomas submitted that it is apparent from the pleading that the respondent's claim herein is founded on breach of contract and tort and not on an indemnity. Learned counsel pointed out the material facts upon which the respondent based his claim are set out in paras 3 to 7
E of the statement of claim. However, he argued, neither an express or implied contract of indemnity, or indeed any basis at all of indemnity, has been pleaded therein to support the claim for an indemnity.

F **[17]** For the reasons aforesaid, it is his contention that the learned judge, in applying *R&H Green & Silley Weir Ltd v. British Railway Board (Kavanaugh, third party) supra*, has failed to consider sufficiently that the present claim is based on a right to damages for breach of contract and not on a straight forward contract of
G indemnity as in that case.

[18] Mr. Jaqdip Singh, for the respondent, in seeking to uphold the judgment of the court below, submitted that unlike any breach of contract, the respondent's claim herein is premised on
H indemnity. It is his contention that the learned judge has rightly followed the principle laid down in *R&H Green & Silley Weir Ltd v. British Railway Board (Kavanaugh, third party)*, *supra*, in the computation of the limitation period.

[19] The differences between the right to damages and the right
I to indemnity was explained at length by Arifin Zakaria FCJ (as he then was) in *Malayan Banking Bhd v. Basarudin Ahmad Khan* [2007] 1 CLJ 309, where he said, at p. 319:

> … The traditional view is that damages for breach of contract committed by the defendant are compensation to the claimant for the damage, loss or injury suffered through the breach. (See *Chitty on Contracts* Vol. 1 29th edn. para 26-001.) This is the common law right arising from breach of contract and it is not the subject of the contract. In other words it need not be provided for in the contract. (See the judgment of Fry LJ in *Birmingham and District Land Company v. London and North Western Railway Company (supra)*. This right is contained in s. 74(1) of the Contracts Act 1950 …
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> By contrast indemnity is a right which has to be provided for in the original bargain between the parties. It is a formal legal acceptance of responsibility for damage or loss. Indemnity springs from contract express or implied. (See P. Ramanatha Aiyur's *The Law Lexicon* 2nd edn.) As stated earlier indemnity and damages as incidence for breach of contract or tortious act are not synonymous but distinct ….

[20] Rights of indemnity may arise from contract, express or implied, from an obligation resulting from the relation of the parties or by statue. Whether in any particular case any right of indemnity arises, and the extent of any such indemnity, will depend upon the terms of the contract or statue in question, or the nature of the relationship. (See *Halsbury's Laws of Malaysia*, Vol 16, at paras 270.190 and 270.191.).

[21] In *Telfair Shipping Corp v. Inersea Carriers SA; The Caroline P* [1984] 1 WLR 533, Neill J, upon analysis of the authorities referred to therein, identified "at least three ways in which a person A who has become liable to B may be able to obtain redress from C". The first way is by an action for damages for breach of contract; the second way is by a claim of an express indemnity; and the third way is under an implied indemnity.

[22] On the right to an implied indemnity, in *J.H.Rayner (Mincing Lane) Ltd v. Department of Trade And Industry And Others And Related Appeals* [1990] 2 AC 418, Lord Oliver said, at p. 520:

> It is quite clear from the authorities which have been drawn to your Lordship's attention as establishing or supporting the general principle of indemnity which the appellants rely that indemnity is not an automatic consequence of a request to do an act. Such a right of indemnity arises only where the circumstances justify the implication of a contract to indemnify …

[23] From the authorities aforesaid, it can be seen that there are many ways in which a right of indemnity may arise. As such, in our view, in order to maintain a claim for indemnity as in the present case, the respondent not only has to plead that the appellant was in breach of its contractual duty or its duty of care to him but also the cause or causes of action for such an indemnity, ie, whether founded on an express or implied contract, or on an implied indemnity arising from the relationship between the parties.

[24] For the purpose of determining the nature of the respondent's claim herein, we find it necessary to have regard to the manner in which he pleaded his case. Before that, we paused to remind ourselves on the importance of pleading. In *Bullein & Leake & Jacob, Precedents of Pleadings,* 15th edn "pleadings" is described as a generic term to describe the formalized process by which a party states its case at a trial. One essential feature of pleadings is to state precisely the basic facts which give rise to a valid legal claim or defence so as to define the issues between the parties. It is also trite law that parties are bound by their own pleadings. (See *State Government of Perak v. Muniandy* [1986] 1 MLJ 490, and *Koh Siak Poo v. Sayang Plantation Berhad* [2002] 1 CLJ 501).

[25] In the instant appeal, the material part of the respondent's claim can be summarized as follows. It is not disputed that the appellant and the respondent have entered into a M.O.U. for the development and operation of the Club. The respondent asserted that he only agreed to participate in the project after being convinced by the appellant that they were experts in that area (see paras 3 and 4 of the statement of claim).

[26] The terms of the M.O.U are set out in para 4 of the statement of claim and are not disputed. It spelt out the duties and responsibilities of the appellant, which include the carrying out of feasibility study of the project, the appointment of technical consultants and negotiating for the acquisition of the site. The appellant was also responsible for the entire financial management of the project. Paragraph 5 of the statement of claim sets out in detail the mode of execution of the project, including the signing of the share acquisition agreement under which the Club was to purchase RDB's shares from Allied.

[27] Paragraph 6 of the statement of claim sets out the members objection over the share sale and the share acquisition agreement which culminated in the filing of the said suits for which the respondent was found to be liable (paras 7 and 8 of the statement of claim). The nub of the respondent's case is pleaded in para 9 of the statement of claim where he asserted that his liabilities under the said suits were attributed to the appellant's breach of contract or duty of care owed to him. In para 10.1, the respondent asserted that by reason thereof he suffered loss and damages in terms of the judgment. The respondent prayed, *inter alia*, for an order to be fully indemnified by the appellant.

[28] From the respondent's statement of claim as summarized above, we agree with learned counsel for the appellant that neither an express or implied contract of indemnity, nor any other basis of indemnity, were pleaded as the basis for his claim for an indemnity. In our view, where a person A is claiming to be indemnified by B in respect of his liability to C, he must plead with clarity the basis of his entitlement to such an indemnity, ie, whether it arises from any breach of contract, express or implied, or from any breach of duty of care, or otherwise to be implied from the nature of their relationship. It is not sufficient for him to merely include a prayer for an indemnity in the statement of claim without first stating the facts upon which such claim is founded.

[29] In the present appeal, we noted that none of the aforesaid elements was pleaded in the statement of claim to formulate or sustain a complete cause of action for an indemnity. Based on the pleadings, it is our finding that the respondent's claim herein is merely founded on a breach of contract and breach of duty of care in tort.

Whether Respondent's Claim Is Time-Barred

[30] Next we turn to consider the issue of limitation. Learned counsel for the appellant pointed out that by virtue of s. 6 of the Act, an action founded on contract or tort shall not be brought after the expiration of six years from the date in which the cause of action accrued. Relying on *Nasri v. Mesah* [1971] 1 MLJ 32, he submitted that the cause of action founded on contract accrues on the date of its breach. As to an action founded on breach of duty of care in tort, learned counsel submitted that based on the authority of *Ong Ah Bee v. Hii Chung Siong, Robin* [1993] 1 CLJ 504, time begins to run from the commencement of such breach.

[31] Mr Jaqdip Singh on the other hand contended that time does not run from the date the contract was breached but runs only from the date when the respondent's liability was ascertained by the court. In support, the court was referred to *R&H Green & Silly Weir Ltd v. British Railways Board (Kavanaugh, third party)*, *supra*, which was followed and adopted by the learned judge.

[32] The period of limitation prescribed by s. 6 of the Act for an action founded on contract or tort is six years from the date on which the cause of action accrued. In the present appeal, it is apparent to us that it is the plaintiff's pleaded case that he had suffered damages in consequence of the defendant's breach of contract or alternatively breach of duty of care. The question is when did the damage happen.

[33] Having found that the plaintiff's statement of claim was framed as a breach of contract and breach of duty of care, then following *Nasri v. Mesah* and *Ong Ah Bee v. Hii Chung Siong*, *Robin, supra*, the causes of action would date from the breach. In the present case, the alleged breaches as particularized in para 9.1 of the statement of claim relate to the advice given by the appellant to the respondent with regard to the setting up of the Club, and the valuation of RDB shares in the share acquisition agreement, both of which must have taken place at the latest before 1983 when the members refused to pay the balance of the purchase price of the share sale. The present action which was only filed on 20 August 2003 was therefore statute-barred pursuant to s. 6 of the Act. In our view, the learned judge had fallen into error in the computation of the limitation period when he failed to appreciate that the respondent's pleaded case herein was founded on breach of contract and tort and not on an indemnity.

[34] With regard to the filing of the unconditional appearance, we are unable to agree with learned counsel for the respondent that the appellant, having filed such an appearance has, abandoned its right to file the application under O. 18 r. 19 of the RHC. The said rule clearly provides that a striking out order may be made 'at any stage of the proceedings'. It must necessarily follow that neither the entry of an unconditional appearance, nor the serving of the statement of defence, precludes the appellant from making an application under the said rule. To hold otherwise would run counter to the express provisions of the said order. (See *Chan Min*

Swee v. Malawangi Sdn. Bhd. [2000] 7 CLJ 1, *N. Carrupaiya v. MBf Property Services Sdn. Bhd. & Anor* [2000] 4 CLJ 116, *Fu Yen Development Sdn. Bhd. (suing as a firm) v. Shelley Yap Leong & Co (sued as a firm)* [2001] 3 CLJ 946, and *Doree Industries (M) Sdn. Bhd. & 3 Ors v. Sri Ram & Company (didakwa sebagai sebuah firma) & 3 Ors* [2001] 4 CLJ 446).

[35] For the above reasons, we unanimously allowed the appeal with costs. The order of the High Court was set aside, and deposit paid into court was ordered to be refunded to the appellant.